

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 1, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP2440-CR

Cir. Ct. No. 2014CT455

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CURTIS D. CHRISTIANSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Eau Claire County: PAUL J. LENZ, Judge. *Affirmed.*

¶1 STARK, P.J.¹ Curtis Christianson appeals a judgment of conviction for third-offense operating a motor vehicle while intoxicated (OWI). Christianson

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

argues the circuit court erred when it denied his motion to suppress because the officer who conducted the traffic stop lacked either reasonable suspicion to believe Christianson was intoxicated or probable cause to believe a traffic violation had occurred. We disagree and affirm.

BACKGROUND

¶2 Christianson was charged with OWI and operating a vehicle with a prohibited alcohol concentration (PAC), both as third offenses. Christianson filed a motion to suppress all evidence obtained from a traffic stop.

¶3 Officer John Gunderson, the sole witness at the suppression hearing, testified that at approximately 12:53 a.m. on October 16, he was driving northbound on Highway 37 in the Township of Brunswick. He testified he was on patrol for a vehicle reportedly involved in an incident in a nearby town. At that time, he took note of a pickup truck driving directly in front of his squad car. The driver of the vehicle was later identified as Christianson. Gunderson testified that as he followed Christianson, he observed Christianson deviate from his lane at “different” and “numerous” times by drifting over or near the fog line, back into the traffic lane, and across the center line. Gunderson testified Christianson crossed the center line “more than once,” but he could not recall the exact number. He also testified the inside of the vehicle’s driver side tires was six to twelve inches across the center line at some point during his observations.

¶4 Gunderson testified he followed Christianson for about two miles on Highway 37, and approximately forty percent of that distance was through a construction zone. Gunderson observed construction barrels were placed in an adjacent left lane in the construction zone, but they did not infringe upon the primary right lane of travel or reroute traffic. Once Christianson entered the

construction zone, Gunderson testified that Christianson's driving behavior was less erratic but remained "somewhat consistent" with what he observed outside of the construction zone.

¶5 While in the construction zone, Gunderson observed Christianson drift over the fog line on the right side of the lane while approaching a bridge with a guard rail. Gunderson then activated his emergency lights and pulled over Christianson. Gunderson testified that his squad car's camera automatically activated and recorded about thirty seconds of video feed prior to the time he activated his emergency lights.² Upon approaching Christianson's truck after it came to a stop in the construction zone, Gunderson noticed that the inside of Christianson's vehicle smelled of alcohol and Christianson's eyes were bloodshot and glassy. Christianson failed field sobriety tests and was arrested.

¶6 The circuit court denied Christianson's suppression motion. It found Gunderson had a reasonable, articulable basis to stop Christianson because his vehicle "was deviating within his lane and crossed the center line on more than one occasion" before Gunderson stopped Christianson. Christianson was ultimately convicted of OWI as a third offense after a jury trial and the PAC charge was dismissed. Christianson appeals the denial of his motion to suppress.

² The squad car video showing the traffic stop was played during the suppression hearing. Christianson notes several times that Gunderson never separately activated the camera by itself, but he fails to explain the significance of this fact.

DISCUSSION

¶7 Christianson argues Gunderson did not have probable cause to believe Christianson violated a traffic law, and therefore there was no basis to conduct a traffic stop.³ Traffic stops by law enforcement officers are considered seizures under the Fourth Amendment. *State v. Gammons*, 2001 WI App 36, ¶6, 241 Wis. 2d 296, 625 N.W.2d 623. A law enforcement officer “may conduct a traffic stop when he or she has probable cause to believe a traffic violation has occurred.” *State v. Popke*, 2009 WI 37, ¶13, 317 Wis. 2d 118, 765 N.W.2d 569 (citations omitted). The evidence available to a reasonable officer must establish that a violation “is more than a possibility,” but it need not rise to the level of whether “guilt is more probable than not.” *Id.*, ¶14.

¶8 Whether an officer had probable cause to conduct a traffic stop is a question of constitutional fact to which we apply a two-step standard of review. *Id.*, ¶10. We review the circuit court’s findings of historical fact under the clearly erroneous standard, and we review independently the application of those facts to constitutional principles. *Id.*

¶9 Christianson argues Gunderson lacked probable cause to believe Christianson violated WIS. STAT. § 346.13(1).⁴ He argues that the circuit court

³ It is clear that reasonable suspicion may also justify all traffic stops based upon traffic violations. See *State v. Houghton*, 2015 WI 79, ¶30, 364 Wis. 2d 234, 868 N.W.2d 143. The State contends that Gunderson’s stop was lawful regardless of the standard. We agree, but because *Houghton* was decided after the circuit court’s ruling on Christianson’s suppression motion, we only analyze whether there was probable cause to find a violation of a traffic law. Because this issue is dispositive, we need not reach Christianson’s alternate argument that Gunderson did not have reasonable suspicion to conduct a traffic stop for possible intoxication. See *Turner v. Taylor*, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716.

⁴ WISCONSIN STAT. § 346.13(1) states in relevant part: “The operator of a vehicle shall drive as nearly as practicable entirely within a single lane and shall not deviate from the traffic lane in which the operator is driving without first ascertaining that such movement can be made with safety to other vehicles approaching from the rear.”

improperly relied on Gunderson’s testimony about Christianson’s lane deviations prior to the video activation and suggests the court should have disregarded this unsubstantiated testimony. In addition, although Christianson concedes he crossed the fog line while traveling in the construction zone, he claims he appropriately responded to hazards created by construction barrels, and was justified in deviating from his lane because he caused no safety concerns to vehicles approaching from the rear.

¶10 We agree with the State that although the circuit court did not specify the statute Christianson violated, Gunderson had probable cause to believe Christianson violated WIS. STAT. § 346.13(3). That statute states, in relevant part, “when lanes have been marked or posted for traffic moving in a particular direction or at designated speeds, the operator of a vehicle shall drive in the lane designated.” The court found that Christianson did not drive in his designated lane when he deviated from the lane multiple times prior to and after entering the construction zone. Those findings are supported by Gunderson’s testimony, the video recording, and Christianson’s own concession he drove over the fog line. Gunderson was cross-examined regarding the reliability of his observations versus the police report and the squad car video. The court was entitled to resolve any credibility issues in its findings. *State v. Baudhuin*, 141 Wis. 2d 642, 647, 416 N.W.2d 60 (1987). These findings indicate Christianson more than possibly committed a violation of § 346.13(3). See *Popke*, 317 Wis. 2d 118, ¶14.

¶11 Christianson asserts that interpreting WIS. STAT. § 346.13(3) as being violated anytime a vehicle deviates from a designated lane leads to absurd results because it ignores “the practical realities of driving in Wisconsin” by turning necessary evasions of animals and, as he claims here, construction equipment into traffic violations. This argument ignores the facts of this case.

Gunderson testified, without contradiction, that the construction barrels did not infringe upon the open lane so as to reroute traffic. Christianson also does not account for the deviations outside of the construction zone. As a result, Christianson's statutory interpretation argument must fail. We conclude Gunderson had probable cause to believe Christianson committed a violation of § 346.13(3), and the court properly denied Christianson's suppression motion.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

